IN THE

# Supreme Court of the United States

## No. 611.

October Term, 1947.

LOEW'S INC., PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, STANLEY COMPANY OF AMERICA, INC., UNIVERSAL FILM EXCHANGES, INC. and UNITED ARTISTS CORPORATION,

*Petitioners,*

*v.*

WILLIAM GOLDMAN THEATRES, INC.,

*Respondent.*

## REPLY BRIEF OF LOEW'S INCORPORATED, PARAMOUNT PICTURES, INC., RKO RADIO PICTURES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, UNIVERSAL FILM EXCHANGES, INC., AND UNITED ARTISTS CORPORATON (DISTRIBUTOR PETITIONERS).

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## ARGUMENT.

Several paragraphs of respondent's brief require a reply by the distributor petitioners.

### I.

The statements made on page 3 under numbered paragraph 2 are completely outside of the Record in this case.

They deal with the theatre situation elsewhere than in Philadelphia. They are attributed by the respondent to the Government's brief in **The United States of America v. Paramount Pictures, Inc., et al.**, October Term, 1947, No. 79. However, there were no findings in **United States v. Paramount** supporting the statements made in respondent's brief, and there was no evidence which would have sustained such findings.

## II.

The most objectionable statements made in respondent's brief are those which appear as numbered paragraph 7 on page 5, and numbered paragraph 2 on page 15.

In these paragraphs, respondent seeks to convey the impression that petitioners' objections to the affirmance of respondent's requests relating to the Erlanger Theatre's inferiority of location, etc.—with which the petition for certiorari and our brief in support thereof dealt extensively —were afterthoughts and were not brought to the attention of the trial court.

Thus, respondent says that, "No defendant has ever filed of record in the District Court any objection to these findings * * *". And (p. 15):

> "2. The defendants' objections are plain afterthoughts. No such objections were made in the answer to the complaint, or in answer to interrogatories, or even in the trial court after a finding of fact to the contrary had been made."

We hesitate to characterize these statements as an attempt to mislead this Court; but they can scarcely be regarded otherwise.

The same objections which are made in our petition for certiorari and in our brief in support thereof, to the affirmance of Plaintiff's Requests Nos. 19, 22, 30 and 31 were made to the trial judge in a printed reply brief filed with him *before* he made his findings and rendered his adjudication.

After the adjudication came down, petitioners were not required to repeat these objections in the trial court. Rule 52 (b) expressly provides:

> "* * * When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

And, of course, the filing of exceptions was rendered unnecessary by Rule 46.

Petitioners' answers to the complaint and to the interrogatories were fully sufficient. In filing replies to the interrogatories, the several defendants were not presenting their evidence to the court. All that was necessary was a responsive answer to the questions propounded. We submit that it was entirely proper to express conclusions, leaving until the time of trial the amplification of those conclusions by detailed evidence giving adequate reasons.

Furthermore, it was not the petitioners but the respondent which offered in evidence the answers to the interrogatories.

In the proceedings before the trial court, petitioners definitely raised the question of the Erlanger's suitability as a first run motion picture theatre. This is evidenced by Warners' Request for Finding No. 20, affirmed by the trial court (R. 947a) which is quoted in full on page 8 of the petition for certiorari.

Also, the cross-examination of Mr. Goldman (R. 417a-418a; 420a) made it apparent that petitioners were developing at the trial, the undesirable location of the Erlanger.

In every brief filed with the Circuit Court, petitioners took the same position which they are taking now, that the affirmance of certain of respondent's requests for findings of fact were without any evidence whatever to support

them, and that certain other statements made by the trial court were contrary to the only inferences which could possibly be drawn from anything in the Record.

## III.

In reply to the petitioners' contentions in the petition for certiorari and in their briefs, respondent in this Court has used exactly the same technique with which it met the same arguments before the Circuit Court. Instead of furnishing to the Court references to anything in the Record supporting the findings and statements to which petitioners object, respondent has wholly ignored our objections.

Indeed, respondent's case is based almost entirely on the objectionable requests and statements which it assumes are unassailable.

What we said about the Circuit Court's opinion is equally applicable to respondent's brief. If the references to respondent's affirmed Requests Nos. 19, 22, 30 and 31 were eliminated, respondent's brief would have no foundation to stand upon.

The only attempt to support the findings is a quotation from the Circuit Court's opinion, "There can be no possible dispute about these findings" (p. 10, citing 150 F. (2d) at p. 741).

The fact is that there was before the Circuit Court just as there is here, a vigorous dispute about these findings. The Circuit Court ignored the dispute, just as the respondent is now doing.

## IV.

We are amazed at the quotation on page 19 of a part of Harry Warner's telegram (R. 1127a) without any indication to this Court that the telegram was dated January 30, 1933, when Mr. Goldman was Warners' Philadelphia manager, and before respondent was even in existence.

Even if the telegram had been sent at a time which would have made it at all relevant, its contents evidence not a conspiracy but a marked disagreement between Mr. Warner and the Fox Film Corporation with regard to the exhibition of Fox pictures in Philadelphia.

The telegram was one of a number of documents which mysteriously accompanied Mr. Goldman when he left Warners' employ (R. 445a-446a), and proves nothing at all.

## V.

The statement in numbered paragraph 30 appearing on page 13 of respondent's brief is wholly without foundation. It is true that in a letter dated June 20, 1947, Mr. Goldman made the same statements contained in paragraph 30, to the effect that "assurances" given by counsel during the bill of review argument caused him to decide to take advantage of the court's decree and open the Erlanger after the summer months of 1947. These statements were categorically denied in a letter by petitioners' counsel addressed to respondent's counsel on June 23, 1947, which appears in full at R. 1325.

## VI.

It is absurd for respondent to allege that the witness Emanuel "gave his employers' case away" by testifying as quoted on page 16 of the brief from R. 707a-708a.

The quoted language was used by Mr. Emanuel, but in referring to "A" pictures the witness meant only those pictures with the very highest box office appeal (R. 644a-645a), and Mr. Emanuel qualified the quoted language on the very next page (R. 709a), where, in reply to a question by the court, he stated that the theatre would be very successful "for that type of theatre in this location".

Obviously, no theatre could be assured of obtaining exclusively pictures having the very highest box office appeal, in a city where there are 7 established first run theatres.

This witness, like every other witness called by petitioners, testified that in his opinion the Erlanger's location was so inferior to that of the Warner theatres that any picture shown at the Erlanger would gross substantially less (35-40%) than it would gross in any of the better located Warner theatres (R. 641a-642a, and Ex. D-4, R. 1173a-1174a).

## VII.

Finally, respondent, in the instant proceeding, for the first time undertakes to demonstrate that the Erlanger was equal to the Mastbaum Theatre in all respects (Brief, p. 15).

This is contrary to Mr. Goldman's own position at the original trial (R. 418a), where he testified that a number of years ago he had said of the Mastbaum, "It is the biggest thing in the country; nothing compares with it, and that goes for the Roxy"; that that was still his opinion at the date of the trial; and that the Mastbaum Theatre has 4,500 seats as against the Erlanger's 1,800.

As indicated in our original brief, the trial judge, in his opinion on damages, found that the location of the Erlanger is inferior to that of the Mastbaum. That the Erlanger was opened spasmodically during the period 1933 to 1942, whereas the Mastbaum remained closed, proves nothing whatever as far as concerns the comparative suitability of the two theatres as first run motion picture houses.

Strange as it may seem, a difference of one city block in accessibility to the business and traffic centers of a city is vitally important in considering the desirability of a theatre as a first run motion picture house for any distributor's product. This is especially true when, as here, to get to the less accessible theatre, patrons walk past a number of the more accessible and better known motion picture houses.

**Conclusion.**

Petitioners stand on the statements made in their petition and brief originally filed. Nothing which respondent has said requires retraction or modification of any statement made.

In conclusion, we wish again to point out that in the present case, respondent was attempting to take away from the Warner theatres the exhibition of pictures which were satisfactorily played there. This was not the case of a reservoir of unplayed pictures in which respondent sought to participate. Every suitable feature picture produced by the distributor petitioners during the period involved in this case received a satisfactory showing in one of the better located and established Warner theatres. Respondent insists that it was entitled to take pictures away from Warners, and exhibit them at the expense of these petitioners, which, under all the evidence, and the findings of the trial court on damages, would have received lower film rentals as a result of licensing them to respondent for exhibition in its inferior theatre.

Respectfully submitted,

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